COMMONWEALTH OF MASSACHUSETTS

DUKES, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2018-00056

NOELLE LAMBERT & others[1]

vs.

TOWN OF OAK BLUFFS

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS

Noelle Lambert, along with her parents Judy and Geoffrey Lambert,[2] bring this action against the Town of Oak Bluffs (the "town"), alleging negligence, negligent infliction of emotional distress, and gross negligence, arising out of an accident between a moped driven by Noelle and an unrelated non-party vehicle. The town moves to dismiss the complaint under Mass. R. Civ. P. 12(b)(6), arguing that G. L. c. 258, §§ 10(e), (f), and (j) provides statutory immunity in the factual circumstances alleged by the plaintiffs. For the following reasons, the defendant's motion to dismiss must be **ALLOWED**.

BACKGROUND

In July, 2013, Noelle Lambert rented a moped from Ride-On Mopeds, which is located in the town, and subject to a town bylaw relating to moped rental licenses. Town of Oak Bluffs By-laws, Chapter XV, § F, requires licensed moped rental businesses to provide operator safety instruction "on the licensee's on-premises unobstructed training track which shall be at least 50 feet long and 25 feet wide," unless the town waives the track requirement pursuant to a written

[1] Judy Lambert and Geoffrey Lambert

[2] Where the plaintiffs share the same last name, the court respectfully refers to each individual by their first name.

petition by the licensee. The plaintiffs allege that the town was aware that Ride-On Mopeds did not have a training track as required by § F, but nevertheless issued the business a license to rent mopeds. The plaintiffs further allege that the town was aware of frequent accidents by, and injury to, rental moped operators, which led to the promulgation of the track-requirement bylaw.

While driving the rental moped, Noelle lost control and sideswiped an on-coming truck.[3] Noelle suffered serious injury in the accident, causing the amputation of her left lower leg. [4] Judy and Geoffrey were not present at the accident scene, but the plaintiffs alleged that a bystander called Judy and told her to hurry to "get here" because she did not think that Noelle would "make it." The plaintiffs allege that Noelle then spoke to Judy from the accident scene, telling her about the loss of her lower leg. Thereafter, Noelle was taken by med-flight to a hospital in Boston, where Judy and Geoffrey arrived to see her.

DISCUSSION

When evaluating the sufficiency of a complaint pursuant to Mass. R. Civ. P. 12(b)(6), the court must accept as true the well pleaded factual allegations of the complaint, as well as any reasonable inferences which can be drawn therefrom in the plaintiff's favor. *Eyal* v. *Helen Broadcasting Corp.*, 411 Mass. 426, 429 (1991). In order to survive such a motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009), quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007). These factual allegations, taken as true, must be "'enough to raise a right to relief above the speculative level'". *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636

[3] The driver of the truck had no relationship to the town, and is not a party to this action.

[4] This court is not unmindful of the horrific injuries sustained by this plaintiff, including her parents' anguish and emotional distress, however judicial discretion requires this court to assess the facts and circumstances of this case and apply the law of this Commonwealth devoid of sympathy and emotion.

(2008), quoting *Twombly*, 550 U.S. at 555. Therefore, "[w]hat is required at the pleading stage are factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief, in order to reflect[] the threshold requirement . . . that the plain statement possess enough heft to sho[w] that the pleader is entitled to relief." *Id.*, (internal quotations omitted). See *Iqbal*, 556 U.S. at 678 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

The town is a public employer, and thus tort claims against it are governed by the Massachusetts Tort Claims Act. G. L. c. 258, § 1. Under the G. L. c. 258, § 10(e), a public employer has immunity for "[a]ny claim based upon the issuance . . . [of] any permits, license, . . . or similar authorization." Further, under § 10(j), a public employer has immunity for "any claim based on [a] . . . failure to act to prevent or diminish the harmful consequences of a condition or situation, which is not originally caused by the public employer or any other person acting on behalf of the public employer."[5] The Supreme Judicial Court has "construed the 'original cause' language narrowly to mean an affirmative act (not a failure to act) by a public employer that creates the 'condition or situation' that results in harm inflicted by a third party." *Kent* v. *Commonwealth*, 437 Mass. 312, 317 (2002).

Here, the plaintiffs do not allege that a town employee drove the vehicle which caused Noelle's injury, provided her with rental moped, or directed her use of the moped while on the road. Instead, the only affirmative act alleged in the complaint is the town's issuance of Ride-On Mopeds' license to rent mopeds to persons like Noelle. This conduct falls squarely within the confines of § 10(e) immunity, for a claim based on the issuance of a license. See e.g.

[5] Section 10(j) sets out four exceptions to this immunity; the plaintiffs do not assert that any of those exceptions apply to the pleaded facts.

Morrissey v. *New England Deaconess Ass'n – Abundant Life Communities, Inc.*, 458 Mass. 580, 592-593 (2010) (no liability arising from issuance of highway construction permit); *David* v. *Town of Barnstable*, 65 Mass. App. Ct. 1116 (2006) (unpub.) (no liability arising from issuance of zoning special permit).

The remainder of the complaint solely alleges the town's failure to act, by "fail[ing] to enforce" and "ignor[ing] its own by-laws." As such, the complaint solely alleges that the town failed to prevent the harmful consequences of untrained rental moped operators, a situation created by either the operators themselves, or the rental companies, which the town did not take any affirmative act to "originally cause." Section 10(j) provides the town with statutory immunity from claims arising from that failure. See e.g. *Pallazolla* v. *Foxborough*, 418 Mass. 639, 641 (1994) (immunity for failure of police to control crowd after large sporting event); *Jacome* v. *Commonwealth*, 56 Mass. App. Ct. 486, 489-490 (2002) (immunity for failure to prevent drowning caused by riptide at public beach); *Ford* v. *Town of Grafton*, 44 Mass. App. Ct. 715, 721-722 (1998) (immunity for negligent failure to enforce an abuse prevention order).

The plaintiffs argue that the town's adoption of the moped bylaw indicated an intent to create a special duty to operators of rental mopeds, and that the serious, foreseeable harm of injury related to moped rentals that created a special relationship between the town and moped renters, such that the facts alleged fall within an exception to the public duty rule. See *Irwin* v. *Town of Ware*, 392 Mass. 745, 756 (1984) (under common law public duty rule, no immunity for police officer's failure to detain intoxicated driver, where such failure resulted in "immediate and foreseeable" injury"). But see *Jean W.* v. *Commonwealth*, 414 Mass. 496, 499 (1993) (majority of justices repudiated the common law public duty rule, invited legislature to amend the Tort Claims Act, resulting in the addition of the statutory public duty rule at § 10(j)). However, if the

court were to expand such an exception to the statutory public duty rule to encompass the pleaded facts, "practically every failure to prevent might be recast . . . as originally caus[ing]" a foreseeable injury, and "the exception would swallow the rule." *Brum* v. *Town of Dartmouth*, 428 Mass. 684, 696 (1999) (internal quotations omitted).

Accordingly, the defendant has demonstrated that G. L. c. 258, §§ 10(e) and (j) render the facts alleged in the complaint insufficient to plausibly entitle the plaintiffs to relief under any of their claims. Mass. R. Civ. P. 12(b)(6).[6] For that reason, the defendants' motion to dismiss the complaint must be **ALLOWED**.

ORDER

For the reasons stated herein, it is hereby **ORDERED** that the Town of Oak Bluff's motion to dismiss the complaint be **ALLOWED**.

Robert C. Rufo
Justice of the Superior Court

DATED: April 24, 2019

[6] In light of this court's findings as to statutory immunity under §§ 10(e) and (j), it is not necessary to reach the parties' arguments regarding the sufficiency of facts alleging Judy and Geoffrey's "virtual presence" at the scene of the accident to support recovery on a claim of negligent infliction of emotional distress.